

**DORSEY'S
DEMURRER
IN LEO FRANK'S
CASE
SUSTAINED BY
COURT**

Refuses to Hear Motion
to Set

Aside Verdict
Because De-

Defendant Did Not Hear It Read

The demurrer filed by Solicitor H. M. Dorsey against the latest motion in behalf of Leo M. Frank—the motion to set aside the verdict because the defendant was not present when it was received—was sustained by Judge B. H. Hill, in Superior Court shortly after 11 o'clock Saturday; and the Supreme Court of Georgia will be called on to say whether the decision was right or wrong.

Judge Hill admitted he was in doubt. It was his belief that attorneys for Frank adopted the right practice in bringing the motion to set aside. That was in conformity with the Court of Appeals decision in the Lyons Case, which he himself wrote and in which he still believes he said. In writing that decision, he recalled, he quoted a number of decisions which were in conflict on the point. Solicitor Dorsey had injected further confusion by quoting still others in conflict with it.

"I think it proper, in view of these conflicting decisions, to give the Supreme Court an opportunity to harmonize them and to announce the true rule," Judge Hill said.

GOES TO HIGH COURT.

The demurrer being sustained, no hearing was started on the merits of the motion to set aside. The Supreme Court will consider the demurrer on a Bill of Exceptions to be taken by Attorneys Tye, Peeples & Jordan, and Haas & Alexander.

The matter ended for a time at least, so far as the local Court is concerned, with the announcement by Judge Hill that he sustained the demurrer.

If the Supreme Court does not agree with his view, the matter will be returned to his Court, and the hearing will be held on the main motion.

When informed by a Journal reporter that Judge Hill had sustained the State's demurrer to his motion to set aside the verdict, and that he had lost

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(Continued from Page One.)

the fifth round in his fight for life, just as he had successively lost the four preceding rounds, Leo M. Frank smiled but would make no comment. He did not by his appearance indicate any disappointment. He seemed cheerful and appeared to be in good health.

Solicitor Dorsey argued Friday in support of the demurrer. Attorney John L. Tye followed him, opposing it. Attorney Henry C. Peeples followed Mr. Tye and continued Saturday morning.

At the conclusion of Mr. Peeples' speech Judge Hill said he did not care to hear from the Solicitor in rebuttal.

After complimenting the lawyers on their argument in the Case, the Court said:

"As to the question of practice, I think the true rule was set out in the Lyons Case, although there is some confusion in decision of the Supreme Court, and in writing the decision in the Lyons Case, I called attention to them. Mr. Dorsey has cited many Cases which apparently are in conflict with that rule, and since it is my purpose to sustain this general demurrer, I think it proper to send the question of practice to the Supreme Court."

Judge Hill continued:

"I am going to send this matter up to the Supreme Court that it may harmonize the conflicting opinions cited here. Therefore, Mr. Dorsey, you will take an order sustaining the demurrers, both general and special."

SUSPENSION OF SENTENCE.

Attorney Tye inquired of the Court if he would not include in this order a further suspension of sentence on the defendant. Solicitor Dorsey objected. Judge Hill said he would sign a Special Order, suspending sentence. He announced to the lawyers his intention to leave *Atlanta* Saturday night for a trip of ten days or two weeks; that the defense had twenty days, in which to get its

Bill of Exceptions to the Supreme Court, that the bill could be prepared for him to sign on his return to the city.

ARGUMENT SUMMARIZED.

When Court convened at 10 o'clock Saturday morning, Mr. Peeples continued his argument, beginning by summarizing that which he presented Friday afternoon.

"I think I have shown your honor the Supreme Court of Georgia has emphasized the distinction between Cases involving life, and other Cases," said he. "I think I have shown also that the Courts have held a defendant cannot be deprived of the right to make a motion if that motion is meritorious, regardless of what moves he has made previously in the Case."

Mr. Peeples cited several federal Court Cases. In one of them where William H. Taft appeared as an attorney, the United States Supreme Court held flatly that a man cannot be deprived of his life by a verdict rendered in his absence. Another Case held that in trials for felony, it is not legal to make a move in the absence of the defendant.

In this latter Case, Mr. Peeples said it was true Justice Lamar had dissented on the ground that a defendant cannot take advantage of his own wrong.

Judge Hill interrupted. "Isn't there a difference in the doctrine of waiver and the doctrine of practice?" he asked. "Having selected a remedy and having pursued that remedy to the Court of last resort, and having lost there, can be then taken up another remedy which he had cast aside previously and pursue it?"

Mr. Peeples answered that he would like to take up the answer to the question later in his argument. He cited a number of Cases from other States, notably the Case of Andrew vs. Tennessee. The Supreme Court of that State held a verdict was void because it had been received in the absence of the defendant who had escaped from the Court Room.

Another Case held that a verdict was void because it had been received involuntarily by the Court in the absence of the defendant.

In the Case of Sherrell vs. Mississippi, it was held that the defendant on trial for a capital offense could not waive the right to be present at the rendition of a verdict even though he was on bail and voluntarily absented himself from the Court.

“I think I have shown now the right of a defendant to be present cannot be waived by counsel,” said Mr. Peeples. “I think I have shown by these many decisions, among which there is only one exception—the Cawthorne Case—that the Courts have held almost unanimously that defendant himself cannot waive his presence if the offense with which he is charged involves his life. I will take up now the question of practice.”

PRODUCES AUTHORITIES.

Mr. Peeples read a number of decisions from the Georgia Supreme Court and Court of Appeals, which he contended thoroughly established that the proper remedy in the Case at issue was through a motion to set aside.

“I am sure an examination of the authorities by your honor will satisfy you this is the practice which gives every opportunity that should be given,” said Mr. Peeples.

He declared that in several Cases, such as those which had been cited by the State, where a party desires to set aside a judgment, he has an opportunity to file his bill in equity. But in a Criminal Case, he said, no such opportunity is afforded. However, a substantially similar proceeding has been adopted there, “and it is exactly in harmony with the doctrine promulgated by your honor when you were the Chief Judge of the Court of Appeals. There is no reason, I submit, why the practice laid down by your honor in the Lyons Case is not the proper practice—and it is the practice followed here.”

Mr. Peeples read a number of decisions to support his contention that the Courts recognize a motion to arrest judgment or a recognize a motion to arrest judgment or a motion to arrest judgment or a motion for a new trial as separate and distinct practices from a motion to set aside. Other decisions were read to show that motions to set aside have been filed, and entertained in Cases after motions for a new trial were made and overruled.

In these decisions, he pointed out the motions to set aside were filed at subsequent terms of Court. He read from a number of authorities to show that a verdict can be set aside on defects or irregularities, whether those appear in the record or not. Mr. Peeples frequently drew parallels between the Frank motion and other Cases cited, with the opinion in the Lyons Case written by Judge Hill.

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**INTEREST IS
CENTERED IN
CHARGES IN
FRANK CASE**

Perjury and Bribery
Charges

to Be Considered— Grand Jury Meets Soon

Following the decision of Judge Ben H. Hill, sustaining the State's demurrer to the motion to set aside the verdict against Leo M. Frank, which means that the Frank Case proper is out of the Superior Court at least for several months, interest has again centered in the bribery and perjury charges in the Case.

The grand jury will be called for a meeting either Tuesday or Wednesday of next week. However, it is extremely probable that on account of the accumulation of jail Cases, the next session of the jury will be developed entirely to routine business. In fact, Assistant Solicitor E. A. Stephens is already preparing a calendar of routine Cases to be acted upon by the jury. This means further delay in the Frank Case probe, although it is practically assured that the jury will resume the investigation in the next ten days. Then bills against C. W. Burke, a detective employed by Frank's lawyers, and probably against Jimmie Wrenn and other figures in the Case, will be prepared and submitted to the jury.

The State charges brought originally in the police Court against Dan S. Lehon and three other agents of Detective William J. Burns, are set for a trial in the City Criminal Court on next Wednesday. Lehon and W. W. Rogers, C. C. Tedder and L. C. Whitfield were all bound over to the city Criminal Court under \$500 bonds in addition to being fined by the city recorder. They are charged in the Criminal Court with violating a statute forbidding persons operating as private detectives without first being duly qualified. This is the Case which will be heard Wednesday. Judge Andrew Calhoun will preside at the trial.

This, of course, has nothing to do with the Cases against Lehon and Tedder, where they are charged with subornation of perjury by grand Jury indictments. They will face trial in the Superior Court on the indictments, and it is not likely that they will obtain a hearing for several months.

The attorneys for Leo Frank have the usual twenty days in which to prepare the Bill of Exceptions and appeal to the Supreme Court on Judge Hill's decision on the State's demurrer to the motion to set aside.

Judge Hill left the City Saturday evening for a short vacation, his first in four years, he says, but will return in the next two weeks, and then the Bill of Exceptions will be signed and the Case filed in the Supreme Court. This will give Frank two motions before the Court of last resort in Georgia.

One of the motions before the Supreme Court is that of asking a new trial on the grounds of newly discovered evidence. This is the motion, which was denied more than a month ago, by Judge Hill.

Judge Hill on Saturday sustained the demurrer filed by the State to the defense's motion to set aside and declare void, the verdict on the ground, that Frank was not in the Court room, when this was rendered. The defense will appeal to the Supreme Court on Judge Hill's decision on the demurrer. Should the reviewing Court uphold Judge Hill in his decision then of course the motion to set aside is out of the State Court. Should the Supreme Court, however, hold that Judge Hill erred in sustaining Dorsey's demurrer, then the Case will be sent back and the motion to set aside will be heard by Judge Hill, on its merits. The questions of fact involved in the motion were not entered into the hearing, which ended Saturday, and not even the Solicitor's answer to the motion was read.
